IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 15720 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE D.H.WAGHELA Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ? **1 & 2 YES ; 3 to 5 NO**

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VRUJLAL NATVARLAL RAYKUNDALIYA - Petitioner(s)
Versus
STATE OF GUJARAT & 3 - Respondent(s)

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Appearance :
MR HR PRAJAPATI for Petitioner(s) : 1,
MR PATHIK ACHARYA ASSTT GOVERNMENT PLEADER for Respondent(s):1-3
MR HARIN RAVAL with M.IQBAL A SHAIKH for Respondent(s) : 4,

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CORAM : HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 02/11/2007

C.A.V.JUDGMENT :

1. Invoking Articles 14, 19, 21 and 226 of the Constitution, the petitioner has prayed for a writ of habeas corpus and challenged the order dated 29.5.2007 made in exercise of power under

section 3 of the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1955 (for short, "the Act"). The prayer for release of the petitioner was pressed only on the grounds that representation of the petitioner was not expeditiously disposed and drastic measure of preventive detention was taken without examining the option of filing a criminal complaint for the alleged offence.

2. According to the grounds of detention supplied with the impugned order dated 29.5.2007, kerosene was declared to be an essential commodity under the provisions of section 2 of the Essential Commodities Act, 1955 and, according to the notification issued under section 3 of that Act, no dealer appointed under the public distribution system or a transporter would sell, distribute or supply kerosene under the public distribution system to any person other than the person for whom the supplies was meant. The District Supplies Officer and his inspection team had, on 11.5.2007, inspected the godown and premises of the petitioner and found stock of 7598 litres of unaccounted kerosene and 333 litres of oil; the petitioner did not have any licence or permit for purchasing the stock and he was selling the stock in public in

violation of the Kerosene Restriction On Use and Fixation of Ceiling Price Order, 1993. Similarly, for the storage of oil also, requisite licence was not obtained by the petitioner from the competent officer. After referring to the elaborate enquiries made and the confessions of the petitioner himself regarding purchase and sale of kerosene for earning illegal monthly profit of Rs.15,000/- since last two years, the impugned order stated that two cases under section 6-A of the Essential Commodities Act, 1955 were registered earlier on 14.2.2005 and 31.7.2006 in which 1525 and 75 litres of kerosene was seized and part of that stock was confiscated against which the petitioner had not preferred any appeal. After considering the facts and material placed before the District Magistrate, the impugned order was made on the grounds that detention of the petitioner was the appropriate measure for preventing him from acting in a manner prejudicial to the maintenance of supply of kerosene to the community and that there were reasons to believe that prosecution would not be sufficient because the petitioner would continue his illegal activity after being released on bail.

3. The petitioner has, through his advocate,

made an elaborate representation dated 13.6.2007 with a request to take out copies thereof and forward them to other competent authorities for their consideration.

4. By filing the first affidavit dated 24.7.2007 of Under Secretary, Department of Consumer Affairs, Food and Public Distribution, New Delhi, it is, *inter alia*, stated that the detention order was approved by the State Government on 7.6.2007 and report thereof was sent by them vide letter dated 12.6.2007 which was received in his department on 13.6.2007. Upon examination, it was found to be in order. Representation dated 13.6.2007 made by the advocate of detenu was received in the Central Government on 29.6.2007 and in the concerned section on 2.7.2007 through the State Government. As certain averments were required to be verified, the competent authority desired that specific comments on the averments as also para-wise comments on the representation be called for from the State Government and accordingly, they were called by letter dated 17.7.2007 which were, till then, awaited.

4.1 By affidavit dated 16.8.2007 of Joint Secretary to the Government of Gujarat, Food,

Civil Supplies and Consumer Affairs Department, it is, *inter alia*, stated that the order of detention passed by the District Magistrate, Porbandar was forwarded with the report forthwith and it was approved by the State Government on 7.6.2007 within the stipulated period of 12 days. Thereafter, the State Government forwarded the report to the Central Government alongwith order dated 12.6.2007 within the prescribed time-limit of seven days. Representation dated 13.6.2007 was received in Special Branch of Food, Civil Supplies and Consumer Affairs Department on 19.6.2007 and placed before the Section Officer who cleared the file on 20.6.2007 and it was placed before the Principal Secretary who cleared the file on the same day. Thereafter, the file was placed before the Hon'ble Minister of Civil Supplies on 21.6.2007 who decided to reject the representation on the same day. After receiving the file back on 22.6.2007 in the Special Branch, the detenu was informed about rejection of his representation by letter dated 22.6.2007 through the jail authority.

4.2 By filing second affidavit dated 1.10.2007, it is stated by Under Secretary, Government of India, Ministry of Consumer Affairs, Food and Public Distribution, that

representation dated 13.6.2007 was received in the department on 29.6.2007 and by the concerned section on 2.7.2007. It was observed that certain averments made in the representation required clarification from the State Government. The issues raised in the representation were relevant and material for the purpose of effective consideration. However, the State Government, while forwarding the representation, had not commented and/or responded to the specific contentions of the detenu. Therefore, clarifications were sought from the State Government by letter dated 13/17.7.2007. Since within reasonable time of almost two weeks clarifications were not received from the State Government, a reminder was sent on 30.7.2007. Then para-wise remarks were received in the Central Government on 10.8.2007. Thereafter, the representation was rejected by the Competent Authority in the Central Government on 21.8.2007. 11.8.2007, 12.8.2007, 15.8.2007, 18.8.2007 and 19.8.2007 were closed holidays. The decision of the Central Government was conveyed to the Superintendent, Central Prison, Vadodara on 22.8.2007 by telegram with a direction to convey it to the detenu. It is averred that there were large number of such representations received from various State Governments, including Gujarat, and those had to be examined in as short

time as possible so that the rights of the persons under detention were not infringed. It is alleged that the State Government has not remained co-operative in the matter of forwarding clarifications and/or details to enable him to render his decision.

4.3 Joint Secretary to the Government of Gujarat has filed another affidavit dated 4.10.2007 to, *inter alia*, submit that the points raised in the representation of the petitioner were pertaining to the office of District Magistrate, Porbandar and hence para-wise remarks and clarifications were sought from his office by letter dated 22.7.2007. Since within reasonable time no clarification was received from his office, a reminder was sent on 1.8.2007. Thereafter, office of District Magistrate had sent reply on 4.8.2007 which was received on 8.8.2007 and submitted for approval on 9.8.2007. Thereafter, it was forwarded to the Central Government by speed post letter dated 10.8.2007.

4.4 Collector and District Magistrate, Porbandar has submitted affidavit dated 22.10.2007 with a view to explain the time spent by him in following the procedure as required under the Act. According to him, the Central

Government, vide letter dated 17.7.2007, asked the State Government to furnish parawise comments on the representation of the petitioner. That letter was received by the State Government on 21.7.2007 and, in turn on 22.7.2007, the State Government had asked his office to furnish remarks immediately. That communication dated 22.7.2007 was received by his office on 4.8.2007 and on 4.8.2007 itself, he had sent para-wise remarks to the State Government by courier and they were received by the State Government on 8.8.2007. It was, on that basis, submitted that there was no undue delay on his part in following the procedure required under the law.

5. On the basis of the above chronology of events, it was submitted for the petitioner that the Central Government which was also an appropriate authority for considering the representation dated 13.6.2007 had, even after receipt thereof on 29.6.2007, taken 15 days in seeking clarifications from the State Government and the State Government had taken 13 days, from 22.7.2007 to 04.8.2007, in obtaining remarks from the District Magistrate for forwarding them to the Central Government, without any reasonable explanation for the delay, which amounted to violation of Article 22 (5) of the Constitution. It was also submitted that the presumption as

regards less drastic remedy of prosecuting the petitioner being insufficient, on the basis that the petitioner would continue his illegal activity after being released on bail, was a pure conjecture and revealed non-application of mind. As against that, learned A.P.P. appearing for the State Government and learned Assistant Solicitor General appearing for the Central Government, submitted that the impugned order was made in *bona fide* exercise of power for prevention of black-marketing by the petitioner of kerosene which was an essential commodity supplied through public distribution system and the so-called delay in considering the representation of the petitioner was duly explained and justified. The presumption about futility of criminal proceeding for prevention of prejudicial activity of the petitioner was based on knowledge and subjective satisfaction of the competent authority which may not fall within the area of judicial review, according to the submission.

6. Following judgments, with emphasis on the observations made therein, as under, were cited and discussed at the bar:

(i) ***Rama Dhondu Borade v. V.K.Saraf, Commissioner of Police [AIR 1989 SC 1861]:***

"21. True, there is no prescribed period either under the provisions of the Constitution or under the concerned detention law within which the representation should be dealt with. The use of the words "as soon as may be" occurring in Art. 22(5) of the Constitution reflect that the representation should be expeditiously considered and disposed of with due promptitude and diligence and with a sense of urgency and without avoidable delay. What is reasonable dispatch depends on the facts and circumstances of each case and no hard and fast rule can be laid down in that regard. However, in case the gap between the receipt of the representation and its consideration by the authority is so unreasonably long and the explanation offered by the authority is so unsatisfactory, such delay could vitiate the order of detention".

(ii) In ***State of Tamil Nadu v. Vadivel [(1992) 4 SCC 496]***, the Supreme Court observed:

"10. .....Thus, the question of any period taken in dealing with the representation has to be decided in the particular facts and circumstances of each

case and it cannot be determined on the basis of any rigid period of time uniformly applicable to all cases. A leeway has to be given in considering such representation by the Government and no inference of delay leading to the violation of constitutional mandate enshrined in Clause (5) of Article 22 can be drawn unless it shows that the authorities dealing with the representation had adopted an attitude of leisureliness, supine indifference, slackness, unduly protracted procrastination or callous attitude in considering such representation...."

(iii) Division Bench of this court in ***Maganbhai Ukabhai Makwana v. District Magistrate, Bhavnagar [1993 (1) G.L.H. 892]*** observed:

"16. All told, therefore, what is now required to be considered on the basis of the dates given hereinabove is whether there has been delay due to negligence, carelessness, inaction, avoidable red-tapism and unduly protracted procrastination. In other words, whether the consideration of the report after its receipt on 30th March 1992 the process for which was initiated on 16.4.1992 and completed on 20th April 1992 could be said

to be reasonable expedition.....".

(iv) ***Kundanbhai Dulabhai Shaikh v. District Magistrate, Ahmedabad [1996 (3) GLR 314]*** was relied upon for the observations made therein that *the Government and its officers will not give up their habit of maintaining a consistent attitude of lethargy. So also, this Court will not hesitate in quashing the order of detention to restore the "liberty and freedom" to the persons whose detention is allowed to become bad by the Government itself on account of his representation not being disposed of at the earliest.*

(v) In ***Urmila Naresh Mittal v. Union of India [1998 (2) G.L.H. 308]***, this Court observed:

"8. Thus in light of the discussions and observations made in the aforesaid cases, the following principle is clearly discernible in the matter of orientation and approach to be followed while dealing with the cases of preventive detention:

While the importance of national

economy in the context of organized smuggling activities cannot be undermined rather it has been given a prime importance, while dealing with the cases of preventive detention a balance has to be struck with regard to constitutional safeguards because the only guarantee of personal liberty for a person is that he shall not be deprived of it except in accordance with the procedure established by law and at the same time care has to be taken that the purpose and the object of the Act is not defeated on the basis of a hypertechnical approach to the observance of the procedure and unless and until it is found that the right of effective representation has been invaded to an extent so as to make it defeasible, the interference with the detention would be unwarranted.

(emphasis supplied)

(vi) Division Bench of Bombay High Court in ***Rafiq Abdul Karim Merchant v. Rajendra Singh, Secretary to Government of Maharashtra [1998 Cri.L.J. 2732]*** made pertinent observations as under:

"28. ....in the final analysis the detention order would not be vitiated on

the consideration that the representation of the detenu was disposed off belatedly but on the ground that either there was complete absence of explanation or the explanation offered was untenable and unconvincing. In other words, there may be cases where on account of satisfactory explanation a long delay in disposal of representation may not be fatal. On the converse, there may be cases where the delay in the disposal of representation may be relatively short but still the detention order would be vitiated either because there is no explanation or that offered is unworthy of acceptance".

(vii) ***Rajammal v. State of Tamil Nadu [AIR 1999 SC 684]*** was relied upon for the observations made therein that *merely stating that the Minister was on tour and hence he could pass orders only on 14.2.1998 was not a justifiable explanation, when the liberty of a citizen guaranteed under Article 21 of the Constitution was involved. Absence of the Minister at the Headquarters is not sufficient to justify the delay since the file could reach the Minister with utmost promptitude in cases involving the vitally important*

fundamental right of a citizen.

(viii) In ***Ahamed Nassar v. State of Tamil Nadu [(1999) 8 SCC 473]***, the Supreme Court observed:

"8. In a given case even few days' delay may be fatal while in another set of circumstances a longer delay may still be held to be for valid reasons. Expeditious disposal of any representation only means which could be expeditiously disposed of by the authority concerned but should not be with any unexplained delay or delay through carelessness. This would depend on the facts and circumstances of each case.

"11. ....The stated delay was on account of vagaries of the postal department. It is not attributable to the States. Hence on the facts and circumstances of this case, it is not possible to hold that there was any delay in the disposal of detenu's representation by the Central Government.....".

(ix) In ***Union of India v. Paul Manickam [(2003) 8 SCC 342]***, the Supreme Court observed:

"14. ....If the detaining authority is reasonably satisfied with cogent materials that there is likelihood of his release and in view of his antecedent activities which are proximate in point of time, he must be detained in order to prevent him from indulging in such prejudicial activities, the detention order can be validly made. Where the detention order in respect of a person already in custody does not indicate that the detenu was likely to be released on bail, the order would be vitiated. [See N. Meera Rani v. Government of Tamil Nadu AIR 1989 SC 2027 and Dharmendra Suganchand Chelawat v. Union of India AIR 1990 SC 1196]. The point was gone into detail in Kamarunnissa v. Union of India (AIR 1991 SC 1640). The principles were set out as follows: even in the case of a person in custody, a detention order can be validly passed: (1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has a reason to believe on the basis of reliable material placed before him (a) that there is a real possibility of his release on bail, and (b) that on being released, he would in all probability indulge in prejudicial activities; and (3) if it is felt essential to detain him to prevent him

from so doing. If an order is passed after recording satisfaction in that regard, the order would be valid. In the case at hand the order of detention and grounds of detention show an awareness of custody and/or a possibility of release on bail.

"15. Article 21 of the Constitution having declared that no person shall be deprived of life and liberty except in accordance with the procedure established by law, a machinery was definitely needed to examine the question of illegal detention with utmost promptitude. The writ of habeas corpus is a device of this nature. Blackstone called it "the great and efficacious writ in all manner of illegal confinement." The writ has been described as a writ of right which is grantable ex debito justitae. Though a writ of right, it is not a writ of course. The applicant must show a prima facie case of his unlawful detention. Once, however, he shows such a cause and the return is not good and sufficient, he is entitled to this writ as of right.

"16. In case of preventive detention no offence is proved, nor any charge is formulated and the justification of such detention is suspicion or reasonability and

there is no criminal conviction which can only be warranted by legal evidence. Preventive justice requires an action to be taken to prevent apprehended objectionable activities. (See Rex v. Hallidey 1917 AC 260 and Kubic Dariusz v. Union of India and others AIR 1990 SC 605). But at the same time, a person's greatest of human freedoms, i.e. personal liberty, is deprived, and, therefore, the laws of preventive detention are strictly construed, and a meticulous compliance with the procedural safeguard, however, technical is mandatory. The compulsions of the primordial need to maintain order in society, without which enjoyment of all rights, including the right of personal liberty would lose all their meanings, are the true justifications for the laws of preventive detention. This jurisdiction has been described as a "jurisdiction of suspicion", and the compulsions to preserve the values of freedom of a democratic society and social order sometimes merit the curtailment of the individual liberty. (See Ayya alias Ayub v. State of U.P. and another AIR 1989 SC 364). To lose our country by a scrupulous adherence to the written law, said Thomas Jafferson, would be to lose the law, absurdly sacrificing the end to the means. No law is an end

itself and the curtailment of liberty for reasons of State's security and national economic discipline as a necessary evil has to be administered under strict constitutional restrictions. No carte blanche is given to any organ of the State to be the sole arbiter in such matters."

(emphasis supplied)

(x) In ***D.Anuradha v. Joint Secretary [(2006) 5 SCC 142]***, the Supreme Court observed:

"*19. As regards delay in disposing of the representation, this Court, as early as in 1981 observed in Ummu Saleema case that there cannot be any fixed time and the delay, if any, in disposal of the representation is to be considered vis-a-vis any prejudice that may be caused to the detenu. In para 7 of the said judgment, the following observations were made:*

> "*7. Another submission of the learned counsel was that there was considerable delay in the disposal of the representation by the detaining authority and this was sufficient to vitiate the detention. The learned counsel submitted that the detaining authority was under the obligation to adequately explain each day's delay and*

our attention was invited to the decisions in Pritam Nath Hoon v. Union of India and in Shanker Raju Shetty v. Union of India. We do not doubt that the representation made by the detenu has to be considered by the detaining authority with the utmost expedition but as observed by one of us in Frances Coralie Mullin v. W.C.Khambra, 'the time imperative can never be absolute or obsessive'. The occasional observations made by this Court that each day's delay in dealing with the representation must be adequately explained are meant to emphasis the expedition with which the representation must be considered and not that it is a magical formula, the slightest breach of which must result in the release of the detenu. Law deals with the facts of life. In law, as in life, there are no invariable absolutes. Neither life nor law can be reduced to mere but despotic formulae."

(emphasis supplied)

(xi) In ***Senthamilselvi v. State of Tamil Nadu [(2006) 5 SCC 676],*** the Supreme Court observed:

"6. ...The Minister concerned passed an order on 22.12.2005 and the order of

rejection which was passed on 27.12.2005 was issued on 28.12.2005 which was sent to the Superintendent of the Jail where the detenu was incarcerated, which was communicated to the detenu. It was received by the prison authorities and it was served on the detenu on the day it was received by the jail authority. The factual scenario indicated above indicates that the representation was dealt with utmost expedition. There can be no hard-and-fast rule as to the measure of reasonable time and each case has to be considered from the facts of the case and if there is no negligence or callous inaction or avoidable red tapism on the facts of the case, the Court would not interfere. It needs no reiteration that it is the duty of the Court to see that the efficacy of the limited, yet crucial, safeguards provided in the law of preventive detention is not lost in mechanical routine, dull casualness and chill indifference, on the part of the authorities entrusted with their application. When there is remissness, indifference or avoidable delay on the part of the authority, the detention becomes vulnerable. That is not the case at hand. It may be noted that the writ petition was filed on 22.12.2005, even before the order of rejection was served. That being so the

detenu cannot make grievance that the State had not explained the position as to how his representation was dealt with.

(emphasis supplied)

(xii) In ***Vinod K.Chawla v. Union of India [(2006) 7 SCC 337]***, the Supreme Court observed:

"13. The contention raised cannot be judged by any straitjacket formula divorced from facts. This has to be examined with reference to the facts of each case having regard to the volume and contents of the grounds of detention, the documents supplied along with the grounds, the inquiry to be made by the officers of different departments, the nature of the inquiry, the time required for examining the various pleas raised, the time required in recording the comments by the authorities concerned, and so on.

14. ... ...

"15. The grounds of detention in the present case are a long one running into 35 paragraphs which were accompanied by 82 documents running into 447 pages. The representation made by the appellant was also a fairly long one. The representation made by the appellant on 24.3.1998 was received by the Ministry on 27.3.1998. The

comments of the sponsoring authority were called on 30.3.1998 which were received on 17.4.1998. The comments were placed before the Secretary (R) through the ADG on 22.4.1998 (18th and 19th being holidays). The decision of the Central Government was taken and communicated on 29.4.1998 (25th an 26th being holidays). The representation was also considered by the detaining authority in the meantime and was rejected on 21.4.1998. In the additional affidavit filed on behalf of the sponsoring authority before the High Court, it was stated that the representation was received by them on 2.4.1998 and the comments were dispatched on 17.4.1998. During this period, there were holidays on 4th, 5th, 8th to 12th April and only seven working days were available. Again there were holidays on 18th, 19th, 25th and 26th April. Having regard to the facts and circumstances of the case, we are clearly of the opinion that the entire time taken in consideration and disposal of the representation made by the appellant has been fully explained and it cannot be said by any stretch of imagination that there was any inordinate delay or explained delay in considering the representation made by the appellant. The challenge to the detention order made on the ground of delay

in consideration of the representation made by the appellant has no substance and deserved to be rejected."

(emphasis supplied)

(xiii) In ***Harshala Santosh Patil v. State of Maharashtra [(2007) 1 SCC (Cri) 680]***, the Supreme Court observed:

"12. .....We say so for two reasons: firstly because the representations made by the detenu were required to be considered both by the detaining authority as also the State Government. They were, thus, required to be considered on their own merit upon application of independent mind on the part of the authorities concerned.

"13. So far as consideration of the representation of the detenu by the detaining authority is concerned, it is evident that although the comments of the sponsoring authority, which had been called as back as on 15.4.2006, were received on 24.4.2006, the detaining authority failed to apply its mind thereupon till 29.4.2006. We are not satisfied that having regard to the nature of the representation made by the detenu and/or reliance having been placed upon several judgments as also the remarks of the sponsoring authority, the

detaining authority was required to take five days therefor. He, evidently, sent the record to the Home Department only on 2.5.2006". (emphasis supplied)

7. The above cascade of relevant observations of the Courts clearly enunciates increasing concern for protection of personal liberty tampered by an anxiety about sub-serving the legitimate legislative policy and purpose underlying the laws of preventive detention. If every order of preventive detention were to be sacrificed on the altar of subjective satisfaction about scrupulous adherence to uncodified constitutional safeguards, the purpose of constitutionally valid laws of preventive detention may be defeated. Therefore, the Courts are required to take a holistic view about legality of the detention, taking into consideration the procedure prescribed by law, the nature of illegality agitated or alleged by the detenu, either in the representation or otherwise, as also the practical difficulties and normal consumption of time in deciding any urgent matter at different levels in the Government. Legislatively adopted standard of quick despatch in such matters impinging upon fundamental rights of a citizen can be referred for guidance and accepted as the norm. The Act operationalises

basic requirements of Article 22 (5) insofar as provisions are made in section 8 for communication of the grounds of detention within prescribed time limits with an obligation to afford to the detenu the earliest opportunity of making representation. The Central Government and each State Government is, under section 9, obliged to constitute Advisory Boards manned by high ranking judicial officers upon whom powers are conferred for making inquiries and hearing the detenu, if he so desires, and an obligation is cast to submit its report within seven weeks from the date of detention. Thus, the detenu is provided at least three fora to ventilate his grievances against his lawful or unlawful detention, viz. the Government authorities, the Advisory Board and the High Court. Ironically, the detention which may otherwise be legal, reasonable and necessary, tends to become illegal solely on the basis of delayed consideration of a representation by any one of the authorities to whom it is addressed, even as the independent Advisory Board is obliged to consider all the material placed before it and to hear the person concerned, if he so desires, and submit its report within seven weeks of detention. There is no bar against approaching the High Court simultaneously or in the meantime. Therefore, over-emphasis by the detenu on expeditious

disposal of the representation appears to be incongruous and oblivious of the other statutory safeguards and constitutional remedies available to the detenu. While delay in consideration and disposal of the representation against detention has to be satisfactorily explained with due deference to the constitutional safeguard as interpreted by the Court, acceptance of the explanation depends upon the facts and circumstances of each case, which include the nature of representation, remarks of the sponsoring authority, volume and contents of the grounds of detention, documents supplied with the grounds, inquiries to be made by officers of different departments, nature of inquiry, time required for examining various pleas raised, time required in recording the comments by the authorities concerned and so on, as held by the Apex Court in the judgments referred hereinabove. In such circumstances, the date of approaching the Court and whether, at any time, the detenu made out any substantial ground to challenge the order of his detention, become relevant and assume greater importance. Another relevant aspect and a harsh reality of life is that very often, as in the present case, delay of few days caused in consideration of the representation comes up for close scrutiny in the Court after delay of several months and that delay has to be

accepted just as a fact of life.

8. In the facts of the present case, perusal of the representation submitted by advocate of the petitioner would clearly show the difficulty in even culling out specific grounds of challenge to the order of detention. Lengthy and elaborate paragraphs of the representation are an essay on Article 21, concept of rule of law, justice and exercise of power when personal liberty of a citizen is at stake. Then, the detaining authority is accused of not acting as a prudent person and it is alleged that the detention order was made with some oblique motive. The detaining authority is accused of having failed to consider alternative remedies and having not properly examined the material placed on record. It is submitted that all the allegations made in the grounds of detention are false and fabricated and the petitioner has been wrongly involved with the alleged transaction. In the last three paragraphs of the representation, several documents are demanded in the form of "xerox copies" on the basis of doubts about signatures thereon and request is made to take out copies of the representation and forward them to other competent authorities for their consideration. The whole representation is as vague as it could be and clearly calculated to furnish grounds for

the petition which may have to be filed in the court. Even as that representation was received in the State Government on 19.6.2007 and in the Central Government on 29.6.2007, the present petition was signed and submitted with affidavit on 19.6.2007. It was admitted on 21.6.2007 and Rule was made returnable on 27.7.2007. Thereafter, first order dated 30.8.2007 on record is: "*S.O. (stand over) to 26.9.2007 at the request of Mr.Prajapati*" (learned advocate for the petitioner). Thus, the petitioner was already before this Court even before the authorities could commence consideration of the representation and the petition could have been pressed for an urgent order of interim relief or for early hearing on some substantive ground. Instead, the petitioner has preferred to wait for the affidavits to be filed and depended upon likely lapses to be searched out of them to make out a substantive ground.

8.1 As far as delay caused by the State Government in consideration of the representation by the Central Government is concerned, it is satisfactorily explained, insofar as para-wise remarks and clarifications were immediately sought from the office of District Magistrate, Porbandar and a reminder was also sent to him. It appears that the District Magistrate had received

the communication late but, immediately on its receipt, he had submitted the remarks on the same day and they were forwarded to the Central Government on the next day. As for the delay in calling for para-wise comments by the Central Government, it is submitted on oath by the Under Secretary that the State Government had, while forwarding the representation, not commented upon or responded to the contentions raised by the detenu. The Central Government observed that certain averments made in the representation about genuineness of certain documents, requirement of certain copies and failure to supply "xerox copies of original documents" even when a request was made by the detenu, required clarifications from the State Government. Therefore, after receipt on 2.7.2007 of the representation in the concerned section and consideration thereof, by letter dated 13/17.7.2007, clarifications were sought from the State Government. As clarifications were not received from the State Government within a period of two weeks, a reminder was sent on 30.7.2007. 14th and 15th July, 2007 were holidays. Therefore, time consumed during the period from 2.7.2007 to 13.7.2007 was required to be satisfactorily explained. Although the explanation submitted in the affidavit of the Under Secretary to the Government of India is

vague, the anxiety for and difficulty in identifying the grounds of challenge and formulating the queries are found to be genuine and *bona fide*. Besides that, it is averred that a large number of such representations are received from various State Governments which have to be examined in as short time as possible so as not to infringe the rights of the persons under detention. In these facts, the Court would not be justified in setting aside the impugned order only on the ground of some delay at the end of the Central Government. As observed in ***D.Anuradha*** (supra): "*Laws deal with the facts of life. In law, as in life, there are no invariable absolutes. Neither life nor law can be reduced to mere but despotic formulae*."

9. As regards the ground of non-application of mind to the other remedies available to the authorities, following observations of Division Bench of this Court in ***Chunigar U. Gosai v. District Magistrate [1991 (2) G.L.R. 949]*** were relied upon:

> "*6. In the present case, in the grounds for detention, the detaining authority has not considered less drastic remedy available under Sec.12AA of the Act of 1955 for preventing the petitioner-detenu from*

carrying on his objectionable or offending activities narrated from this perspective by keeping in mind the stringent provisions for bail contained in Sec.12AA of the Act of 1955. There is just a bald statement to the effect that it is not possible to prevent the petitioner-detenu from indulging into his objectionable or offending activities by taking recourse to the ordinary law applicable in that regard. In that view of the matter, there is no escape from the conclusion that the subjective satisfaction reached by respondent No.1 for the purpose of passing the impugned order at Annexure 'A' would stand vitiated. Challenge to the order of detention annexed at Annexure 'A' on this score deserves to be accepted."

However, as held by the Supreme Court in ***Union of India v. Paul Manickam*** (supra):

"E*ven in the case of a person in custody, a detention order can be validly passed if the authority passing the order is aware of the fact that he is actually in custody, if he has a reason to believe on the basis of reliable material placed before him that there is a real possibility of his release on bail and that on being released, he would in all probability indulge in*

prejudicial activities and if it is felt essential to detain him to prevent him from so doing".

Thus, an awareness about possibility of release on bail is held to be enough for proper application of mind. And, as held by Full Bench of this Court in ***Koli Bharatbhai Ukabhai Vegad v. District Magistrate [2001 (2) G.L.H. 335]:***

"47. The order of preventive detention can be recorded against the detenu, who is, already in jail or in custody. Therefore, the order of preventive detention may be made before or during the prosecution. It could also be made with or without prosecution and or in anticipation or after discharge or even acquittal. This proposition is very well expounded in Haradhan Saha v. State of West Bengal AIR 1974 SC 2154. Not only that, in many cases, the Courts have also found that second order on the same ground can be passed if the order of detention is found to be bad or defective on technical ground."

As observed in ***Rex v. Hallidy [1917 AC 260]:*** *"....Preventive detention is largely precautionary and based on suspicion. The Court*

was a least appropriate Tribunal to investigate into circumstances of suspicion on which such anticipatory action must be largely based....". In the facts of the present case where even a criminal complaint was not stated to have been filed, the question of examining the possibility of the petitioner being released on bail was too remote and far-fetched. It also needs to be noted that the provisions of section 12-AA of the Essential Commodities Act were stated to be no longer on the statute book. Therefore, the impugned order cannot be set aside on the ground that the petitioner could have been prevented from carrying on the illegal activity by resorting to other penal provisions.

11. In the facts and for the reasons discussed hereinabove, the petition is dismissed. Rule is discharged with no order as to costs.

Sd/-

(D.H.Waghela, J.)

(KMG Thilake)